United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1644

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

JOHN SHUTTLE,

Petitioner-Appellant,

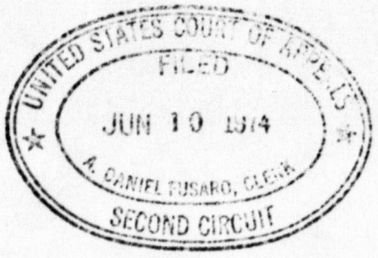
-against-

JULIUS MOEYKENS,

Respondent-Appellee.

Docket No. 74-1644

BRIEF FOR APPELLANT + Appendix



ZACHARY SHIMER
Attorney for Appellant
Office and P.O. Address
30 Rockefeller Plaza
New York, New York 10020

Michael C. Gilbert

Of Counsel

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BRIEF FOR APPELLANT

This is an appeal by petitioner John Shuttle ("Shuttle") from the order of Judge Albert W. Coffrin of the United States District Court for the District of Vermont denying Shuttle's petition for a writ of habeas corpus pursuant to Title 28 U.S.C. §2254. Judge Coffrin's opinion denying the petition is reproduced as Appendix B hereto. Pursuant to Title 28 U.S.C. §2253 and Rule 22(b) Fed. R. App. P., Judge Coffrin has granted Shuttle's request for a certificate of probable cause. Judge Coffrin's order certifying probable cause is reproduced as Appendix C hereto.

Statement of the Issue Certified for Review

Was the refusal of the state court judge to disqualify himself from considering Shuttle's case improper?

Statement of the Case

This is an appeal from an order denying Shuttle's petition for a writ of habeas corpus in which he claimed, among other things, that the bias and prejudice of the state court judge deprived him of due process.

1. The Crime Charged

On September 2, 1971 Shuttle presented for payment to the Chittenden Trust Company a check in the amount of $85 (A.1)* payable to Norbert J. Towne, endorsed by him and also endorsed by Shuttle (S.38).**

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* References so indicated are to pages of the transcript of Shuttle's arraignment proceedings of September 22, 1971 and change of plea proceedings submitted to the District Court with the state's answer (Document No. 7 in the Record. For convenience,the index to the Record is annexed hereto as Appendix D).

** References so indicated are to pages of the transcript of the hearing of the pre-sentencing motions made by Shuttle and his sentencing on January 5, 1972, also submitted to the District Court with the state's answer (Document No. 7).

On September 21, 1971 an Information and Warrant was filed by the State Attorney of Vermont alleging that Shuttle had, by his negotiation of the $85 check, committed the crime of false token,* since Shuttle had obtained, with intent to defraud, money from another person (A.1).**

On September 22, 1971 Shuttle was arrested. At his arraignment, before Judge John P. Connarn of the District Court of Vermont, Unit No. 5, Washington Circuit, Shuttle pleaded not guilty (A.2). On October 19, 1971 the plea of not guilty was withdrawn before Judge Connarn and a plea of guilty to the charge of false token of the $85 check was entered (A.7).

2. Motion to Disqualify

Shuttle was sentenced on January 5, 1972 by Judge Connarn. Prior to sentencing, Judge Connarn heard and considered five motions which had been filed on

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* The crime of "false token" is committed when a person who designedly by false pretenses, with intent to defraud, obtains from another person money or other property, or the signature to any instrument, the false making of which would be punishable as forgery. Title 13 V.S.A. §2002. See State v. Quesnel, 124 Vt. 491, 207 A.2d 155, 156 (1965).

** Shuttle was also charged in the Information and Warrant with two additional counts of false token for unlawfully negotiating checks in the amounts of $60 and $25 (A.1). Upon the entry of Shuttle's plea of guilty to the first count, these two counts were nolle prossed (A.8).

Shuttle's behalf. One of these motions, entitled "Motion To Dismiss And For Other Relief," filed on December 28, 1971, requested Judge Connarn to "disqualify himself and refuse to pass sentence."*

Shuttle's motion to disqualify was based upon Judge Connarn's familiarity with and prejudice against petitioner. The record demonstrates, without contradiction, that over the course of prior years Judge Connarn had both judicial and extrajudicial contact with Shuttle as follows.

(1) In 1965 or 1966, Judge Connarn, as Attorney General of Vermont, had represented the State in connection with a post-conviction review brought by Shuttle (Tr. 42, 44-45).**

(2) Shuttle had on numerous occasions, both in criminal and civil proceedings, appeared before Judge Connarn as a litigant (Tr. 12, 40).

(3) Judge Connarn had, pursuant to subpoena, testified in federal court relating to prosecutions against Shuttle (Tr. 13).

(4) A former law associate of Judge Connarn, Norbert J. Towne, was directly involved in the

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* The motion is attached to Document No. 9.

** References so indicated are to pages of the transcript of Shuttle's post-conviction review by the Washington County Court on September 13 and 14, 1972 submitted by Shuttle with Document No. 9.

crime of which Shuttle was convicted (Tr. 48-49). Mr. Towne was both the payee of the $85 check and the person from whom the check was stolen (A.9; Tr. 48).

Judge Connarn summarily denied the motion that he remove himself from further participation in the proceedings without stating any reasons therefor (S.37; Tr. 17).

3. Sentencing and Appeals

After denying the several motions, Judge Connarn immediately sentenced Shuttle for his conviction of the crime of false token of an $85 check to serve not less than three and one-half nor more than ten years in the Windsor State Prison (S.41). The statutory sentence for the crime is up to ten years and a fine of not more than $1,000 (13 V.S.A. §2002).

Thereafter Shuttle brought a petition for post-conviction relief to the Washington County Court on various grounds, including the refusal of Judge Connarn to disqualify himself. The petition was denied and the denial affirmed by the Supreme Court of Vermont.*

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* The findings of the Washington County Court are attached to Document No. 9 and the opinion of the Supreme Court of Vermont is attached to Document No. 4.

Thereafter, having exhausted his state court remedies, Shuttle filed a petition for a writ of habeas corpus in the United States District Court for the District of Vermont, pursuant to Title 28 U.S.C. §2254. That petition was denied by Judge Coffrin in an opinion dated February 22, 1974 (App. B).

On February 27, 1974 Shuttle filed a notice of appeal together with a request for a certificate of probable cause, pursuant to Title 28 U.S.C. §2253 and Rule 22(b) Fed. R. App. P. In an order dated March 8, 1974, Judge Coffrin certified to this Court that there was probable cause to raise on appeal the issue of whether the state court judge improperly sat in judgment of Shuttle and denied the certificate for the other grounds urged (App. C).

POINT I

THE APPEARANCE OF IMPARTIALITY WHICH IS ESSENTIAL TO THE ADMINISTRATION OF JUSTICE HAS BEEN UNDERMINED BY THE REFUSAL OF JUDGE CONNARN TO DISQUALIFY HIMSELF FROM PARTICIPATION IN THE PROCEEDINGS

The right to trial before an impartial judge is an unquestioned and essential ingredient of the concept of due process of law. Johnson v. Mississippi, 403 U.S. 212, 216 (1971); Mayberry v. Pennsylvania, 400 U.S. 455,

465 (1971); United States v. Meyer, 462 F.2d 827, 836 (D.C. Cir. 1972); In re Union Leader Corp., 292 F.2d 381, 384 (1 Cir.), cert. denied, 368 U.S. 927 (1961); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941); United States v. Thomas, 299 F.Supp. 494, 497-98 (E.D.Mo. 1968). A litigant is entitled, as a fundamental right, "to a fair trial in a fair tribunal, and that fairness requires the absence of actual bias or prejudice in the trial of the case." Knapp v. Kinsey, 232 F.2d 458, 465 (6 Cir.), cert. denied, 352 U.S. 892 (1956); In re J.P. Linahan, Inc., 138 F.2d 650, 651 (2 Cir. 1943).

Moreover, the Supreme Court of the United States has declared that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954).* And courts have recognized that "the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality." Texaco, Inc. v. Chandler, 354 F.2d 655, 657 (10 Cir. 1965), cert. denied, 383 U.S. 936 (1966). See also, e.g. Hodgson v. Liquor Salesmen's Union Local No. 2 of the State of New York, Distillery, Rectifying, Wine & Allied Workers' Internat'l Union of America, AFL-CIO, 444 F.2d 1344, 1348 (2 Cir. 1971);

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* All emphasis added herein unless indicated otherwise.

United States v. Amerine, 411 F.2d 1130, 1133 (6 Cir. 1969); Rapp v. Van Dusen, 350 F.2d 806, 812 (3 Cir. 1965); Lawton v. Tarr, 327 F.Supp. 670, 673-74 (E.D.N.C. 1971).

In its decision In re Murchison, 349 U.S. 133, 136 (1955), the Supreme Court emphasized the importance of eliminating both the probability and the appearance of unfairness in judicial proceedings:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14."

Indeed, in United States v. Zarowitz, 326 F.Supp. 90, 92 (C.D.Calif. 1971), Judge Hauk voluntarily disqualified himself after having concluded that the movant's petition, although failing to show actual bias or prejudice, did, nevertheless, "show the appearance

of possible personal bias or prejudice. . . ." (emphasis in original). Judge Hauk succinctly stated the rationale which underlies the principle that judges not judge when their impartiality and disinterestedness may be reasonably questioned (326 F.Supp. at 92):

> "[A] circumspect and punctilious devotion to the ideal of justice in the abstract as it appears to the public at large, as well as the ideal of fairness as it is applied concretely in the case before us, affirms our determination to disqualify and recuse ourself. Like Caesar who parted from his wife Pompeia because she was not above suspicion, so here to avoid even the appearance of the possibility of personal bias or prejudice, wise discretion and sound judgment compel us to leave this case. . . ." (Footnote omitted).

Against this background of judicial authority, it is apparent that the paths of Shuttle and Judge Connarn have crossed so frequently that the appearance of impartiality was shattered. Judge Connarn has been, at various times, the prosecutor of Shuttle, a witness against Shuttle and the judge of Shuttle.

The record shows that Judge Connarn apparently first had contact with Shuttle in 1963 when, as Montpelier Municipal Judge, Judge Connarn sentenced Shuttle "to state prison in Windsor" (Tr. 40). In 1965 or 1966, as Attorney General of the State of Vermont, Judge Connarn appeared on behalf of the State in connection with certain post-conviction relief actions brought by Shuttle

(Tr. 42, 44-45). Thereafter, Judge Connarn was called to testify in a federal court review of a prior conviction of Shuttle (Tr. 13). Moreover, Shuttle has appeared before Judge Connarn as a litigant on "numerous" occasions (Tr. 40, 44-45). The most recent of Shuttle's appearances before Judge Connarn prior to his arraignment on the charge of false token occurred within "three or four weeks" thereof (A.4; Tr. 55) on a charge that was subsequently dropped (S.40).

Indeed, during the course of making his recommendation on bail to Judge Connarn at Shuttle's arraignment, the State's Attorney himself remarked: "Your Honor, you know Mr. Shuttle quite well" (A.2). More significantly, Judge Connarn, during the arraignment, declared:

> "I am not trying to adjudicate your [Shuttle's] guilt but you are here again on three offenses which constitute felonies only a short time after you were here before. I can appreciate your problems but I am not disposed to reduce your bail at this time" (A.4).

The appearance of judicial impartiality and detachment was further undermined by the close relationship between Judge Connarn and Norbert J. Towne. The $85 check which Shuttle wrongfully endorsed was stolen by an unknown person from the offices of Norbert J. Towne, the payee of the check (A.9). Judge Connarn, prior to his admission to practice law in the State of Vermont, was a law clerk in the office of Norbert J. Towne (Tr. 48).

Judge Connarn, after his being admitted to practice, became professionally associated with the same Mr. Towne for what Judge Connarn termed "some period of time" (Tr. 48-49).

Despite the foregoing, the court below looked for and found no "indicia of actual or subjective bias by the judge" and concluded that it could not find that "the judge's previous contacts with petitioner either as a judge or as Vermont Attorney General created such an inherently prejudicial atmosphere that his judicial neutrality was sacrificed" (App. B, p. 4). Thus, the court below, applying the wrong standard, denied the petition. In substance it held that Judge Connarn retained that quality of judicial detachment and impartiality necessary for the rendition of a judgment which begets no suspicion of the fairness and integrity of the judiciary. The indispensable judicial attributes of total disinterestedness and complete fairness, however, were absent from the sentencing of Shuttle.

Confidence in the judiciary, "essential to the successful functioning of our democratic form of government," United States v. Quattrone, 149 F.Supp. 240, 242 (D.C.D.C. 1957), is undermined when the impersonality of the judicial decision becomes suspect

and doubtful. To insure the continued faith of the public in the impartiality of the judicial system, there must be "the most scrupulous concern for appearances as well as for facts." (149 F.Supp. at 242). Here, this concern went unnoticed and uncared for.

As the court in Pfizer, Inc. v. Lord, 456 F.2d 532, 544 (8 Cir.), cert. denied, 406 U.S. 976 (1972), recently declared, "[i]t is important that the litigant not only actually receive justice, but that he believe that he has received justice." Under the present circumstances, Shuttle's testimony that it was "quite obvious to me that [Judge Connarn] doesn't like me" (Tr. 17) assumes an increased significance. Moreover, his belief that he has been denied his basic right of being fairly and impartially judged by a disinterested tribunal is not lacking in reason or foundation.

In light of the numerous and substantial contacts between Shuttle and Judge Connarn and between Judge Connarn and Norbert J. Towne, reasonable grounds support the inference that Judge Connarn's feelings towards Shuttle, conscious or unconscious, may have operated in the ultimate judgment. Indeed, Mr. Justice Frankfurter expressly recused himself from participation in Public Utilities Comm'n v. Pollack, 343 U.S. 451, 466 (1952), recognizing "that reason cannot control the subconscious influence of feelings of

which it is unaware." He admonished that the "guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." (343 U.S. at 467). Here, a dispassionate observer could "not unfairly" reason that such feelings may in fact have prevailed. "However guilty the defendant in this case may be -- and however reprehensible his 'background' -- he was entitled to be judged by a tribunal free of any possible bias" (emphasis in original). People v. Corelli, 41 App.Div.2d 939, 343 N.Y.S.2d 555, 556 (2d Dep't 1973).

Thus, the court below erred in upholding a procedure which offered a "possible temptation" to Judge Connarn "not to hold the balance nice, clear and true between the State and the accused" and in so doing upheld a denial to Shuttle of due process of law. In re Murchison, 349 U.S. 133, 136 (1955).

POINT II

THE PERSONAL PREJUDICE OF JUDGE CONNARN WAS MANIFESTED DURING THE PROCEEDINGS

The court below, in applying the wrong standard, relied upon United States v. Beneke, 449 F.2d 1259 (8 Cir. 1971), which upheld the refusal of a trial judge to recuse himself upon the filing of an

affidavit of bias or prejudice solely because "the bias or prejudice alleged did not stem from an extra-judicial source." (449 F.2d at 1260). That decision, and others like it, is totally inapposite. Thus, in United States v. Grinnell Corp., 384 U.S. 563, 583 (1966), the Supreme Court, in rejecting a claim of prejudice, set forth the principle which governs claims of prejudice necessitating the disqualification of a judge:

> "The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

Judge Connarn's bias and prejudice against Shuttle, although nurtured by Judge Connarn's judicial contacts with Shuttle, was undoubtedly intensified by his extrajudicial contacts with Shuttle as Attorney General and a witness against him and by the involvement of Judge Connarn's friend and former associate, Norbert J. Towne in the case. Judge Connarn's renewed and increased prejudice against Shuttle stemmed from sources clearly beyond the perimeters of the criminal proceeding and resulted in a decision "on some basis other than what the judge learned from his participation in the case." (384 U.S. at 583).

Although the length of sentence in the Shuttle

proceedings might not, standing alone, evidence Judge Connarn's prejudice against Shuttle, Wolfson v. Palmieri, 396 F.2d 121, 125 (2 Cir. 1968), this factor must be considered within the totality of the circumstances. A sentence of three and one-half to ten years for the crime of false token of an $85 check would seem draconian if imposed by a judge free from any suspicion of partiality and prejudice. Under the circumstances, it becomes clear that the imposition of so lengthy a sentence is the product of judicial prejudice rather than judicial reason.

Indicative of Judge Connarn's prejudice against Shuttle is the amount of bail set. When Shuttle was initially charged with three counts of false token, bail was set at $2,000 per count or $6,000 (A.3) despite a plea for a reduction (A.4). When two counts were nolle prossed, the amount of bail was increased to $4,000 (A.10). It is true that in setting the amount of bail a number of factors are considered. Noteworthy, however, is the fact that in a subsequent case where a defendant pleaded guilty apparently to two charges of false token Judge Connarn set bail of $100 on each count, for a total of $200 (Tr. 56-57). Unfortunately, the record contains no indication as to the amount involved in this subsequent case. But

in light of the fact that when Shuttle, a resident of Vermont (Tr. 57), pleaded guilty to one count of false token of an $85 check, bail was set in the amount of $4,000, the inference is inescapable that Judge Connarn, consciously or not, meted out two standards of justice -- one to Shuttle and one to other defendants.

Additional indications of Judge Connarn's bias and prejudice against Shuttle could be cited. Shuttle testified that Judge Connarn, when appearing as a witness in federal court in connection with a review of an unrelated proceeding concerning Shuttle, testified in a hostile and contradictory manner (Tr. 13). Furthermore, Shuttle testified that Judge Connarn's dislike of him was "obvious" and was manifested in the course of Judge Connarn's prior contacts with Shuttle (Tr. 17-18). Suffice it to say that the impact and cumulative effect of these events further demonstrates that the sentencing of Shuttle did not take place in an atmosphere of judicial impartiality.

Prior cases have held that "mere knowledge" of the defendant's background by the judge is not sufficient to compel judicial disqualification. Webster v. United States, 330 F.Supp. 1080, 1086 (E.D.Va. 1971). Courts have also stated that the fact that the judge, in his prior capacity as a prosecutor, had prosecuted

the defendant on an unrelated charge, "is not, standing alone, a fact requiring disqualification." United States v. Maroney, 280 F.Supp. 277, 279 (W.D.Pa.), cert. denied, 393 U.S. 873 (1968). Additionally, "a mere showing of prior judicial exposure" to the defendant has been held to be an insufficient ground for judicial disqualification. Lyons v. United States, 325 F.2d 370, 376 (9 Cir. 1963), cert. denied, 377 U.S. 969 (1964); United States v. Sansone, 319 F.2d 586, 587 (2 Cir. 1963).

The sound basis of each of these individual holdings is not disputed. However, it is submitted that when all of these various factors, and more, converge and are present in one judicial proceeding the probability of actual personal prejudice becomes so great that the judge should be disqualified. In this case Judge Connarn has variously been a prosecutor of Shuttle, a witness against Shuttle, a judge of Shuttle, and, significantly, a long time friend and professional associate of Norbert J. Towne, the payee of the check involved in Shuttle's crime. The cumulative effect of these contacts is staggering. Moreover, as a result of the convergence of all of these factors, not only has the appearance of judicial impartiality been destroyed, but factors which might otherwise not be considered as indicia of prejudice (i.e., length of

sentence and amount of bail) assume a different connotation and significance.

In People v. Corelli, 41 App.Div.2d 939, 343 N.Y.S.2d 555 (2d Dep't 1973), the court held that the trial judge committed reversible error when he refused to disqualify himself. There, the trial judge, had in his prior capacity as Assistant District Attorney presented another case involving the defendant to a grand jury. Additionally, it appeared that the judge knew about the defendant's criminal "background," 41 App.Div.2d at 939, 343 N.Y.S.2d at 556.

In Corelli the coalescence of two factors resulted in the court's concluding that the trial judge had erred in refusing to disqualify himself. In Shuttle's case, the coalescence of at least four factors compels the same conclusion: Judge Connarn was wrong in refusing to disqualify himself.

A defendant is entitled to a trial "before a judge who is not biased against him at any point of the trial and, indeed, most importantly, at sentencing." United States v. Thompson, 483 F.2d 527, 529 (3 Cir. 1973). Shuttle has not been accorded this basic right. As disclosed by the record, Shuttle has not only been deprived of "the appearance of evenhanded justice which is at the core of due process," Mayberry v. Pennsylvania,

400 U.S. 455, 469 (1971) (Harlan, J., concurring), but the actual prejudice of Judge Connarn has prevented Shuttle from being sentenced in accordance with elemental fairness.

We submit, therefore, that the refusal of the judge to remove himself from further participation in the proceedings was so improper that Shuttle was denied due process of law.

CONCLUSION

The order appealed from should be reversed and the writ granted.

Respectfully submitted,

ZACHARY SHIMER
Attorney for Appellant
30 Rockefeller Plaza
New York, New York 10020

Michael C. Gilbert,
of Counsel

June 10, 1974

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Civ. 73-198 COFFRIN
Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
JOHN SHUTTLE vs. JULIUS MOEYKENS	For plaintiff: John Shuttle, pro se POB 26 Windsor, VT 05089 For defendant: William T. Keefe, Esq. Assistant Attorney General Pavilion Office Building Montpelier, VT 05602

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed AUG 3 1973	Clerk					
J.S. 6 mailed	Marshal					
Basis of Action: Petition for Writ of Habeas Corpus	Docket fee					
	Witness fees					
Action arose at: 2	Depositions					

APPENDIX A

DATE 1973	PROCEEDINGS	Date Order Judgment No
July 20	Filed Petitioner's Motion to proceed in forma pauperis and affidavit.	1.
Oct. 15	Filed Affidavit re Petition to Proceed in Forma Pauperis.	2.
" 16	Filed Order allowing Petitioner to proceed in Forma Pauperis. Mailed copy to Petitioner.	
" "	Filed Petition for Writ of Habeas Corpus.	3.
" "	Issued Order to Show Cause and delivered same to Marshal for service.	4.
" "	Filed Plaintiff's Supplemental Material.	5.
" 18	Filed Order to Show Cause returned served.	6.
" 25	Filed defendant's answer.	7.
" 29	" Petitioner's Motion to represent himself.	8.
1974		
Feb. 7	Filed plaintiff's motion to amerd petition.	9.
" 12	At the Call of the Calendar before Judge Coffrin, it was	
" "	ORDERED: Case passed.	
" 22	Filed Opinion and Order - - denying the petition for a writ of habeas corpus. Copy mailed to petitioner and Attorney General.	10.
" 27	Filed Notice of Appeal, Request for Certificate of Probable Cause and Certificate of Service. Mailed copy to parties.	11.
Mar. 8	" Order -- The Court certifies that there is probable cause to raise on appeal the first issue contained in petitioner's request for certificate of probable cause filed 2/27/74 and there is no probable cause to raise the second issue contained in said request for the reasons as stated. Copy mailed to parties.	
Apr. 5	Mailed record on appeal to Clerk, U. S. Court of Appeals for the Second Circuit; N. Y., N. Y. Attys. notified.	12.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

John Shuttle	:	
	:	Civil Action
v.	:	
	:	File No. 73-198
Julius Moeykens	:	

OPINION AND ORDER

This is a habeas corpus petition by a state prisoner incarcerated pursuant to a sentence imposed on January 5, 1972 after a guilty plea was entered to a charge of false token under 13 V.S.A. § 2002. Having concluded from the petition and supporting documents that petitioner had exhausted his available state court remedies as required by 28 U.S.C. § 2254(b), an order was issued directing respondent to show cause why the writ should not be granted. 28 U.S.C. § 2243. The return filed by respondent denies the substantive allegations of the petition and contains the verbatim transcript of petitioner's arraignment, change of plea and sentencing hearings. Since the documents filed in this case reveal that the material facts are not susceptible to dispute, we proceed to the merits of petitioner's legal contentions.[1] Townsend v. Sain, 372 U.S. 293, 318 (1962).

Plaintiff's initial contention is that he was denied access to a pre-sentence report compiled preparatory to sentencing. It is suggested that this pre-sentence report may have contained factual inaccuracies insofar as it made reference to a prior conviction of petitioner which was vacated by this court in 1969. Shuttle v. Smith, Civil No. 5395 (D. Vt. 1969).

We begin our analysis of petitioner's claim with the observation that, absent exigent circumstances, a defendant has no constitutional right to have the results of any pre-sentence report disclosed either to him or his counsel. United States v. Samaniego, 437 F.2d 1244, 1247 (9th Cir. 1971); Manley v. United States, 432 F.2d 1241, 1245 (2d Cir. 1970); United States v. Virga, 426 F.2d 1320 (2d Cir. 1970), cert. denied, 402 U.S. 930 (1970); Spradlin v. United States, 394 F.2d 816, 813 (9th Cir. 1968).

In the case before us, however, petitioner's counsel was granted access to the pre-sentence report and was given an opportunity to point out any inaccuracies or misstatements that he believed appeared therein which he did at some length. Specific reference was made during the sentencing hearing to the vacated conviction resulting from this court's action. Manley v. United States, supra, and Spradlin v. United States, supra, are closely analogous to the case at bar and lead us to conclude that the latitude given to his counsel at sentencing was clearly sufficient to protect petitioner's interests.

Petitioner also advances the contention that the advice and assistance of his court-assigned counsel denied him the effective assistance of counsel and coerced his guilty plea. Specifically, petitioner contends that his counsel had discussed with him the possibility that the state's attorney might proceed against him as an habitual felon under 13 V.S.A. § 11 and that petitioner's counsel, who was not aware that one of the petitioner's previous convictions had been invalidated by the action of this court in 1969,

advised petitioner to plead guilty to the false token charge by means of a plea bargain in return for a promise by the state's attorney to forbear utilization of the habitual offender statute. Petitioner claims that had his attorney informed him that the invalidated conviction could not be used against him, he would not have pleaded guilty to the charge of false token and would have insisted on his right to a jury trial.

The persuasiveness of this argument dramatically pales when it is considered that petitioner, at the time the false token charge was brought, stood convicted of no fewer than six previous felonies. Since conviction of four felonies subjects an individual to the jeopardy of the habitual felon statute, the invalidated conviction in 1969 is wholly irrelevant as there were ample prior convictions to invoke the operation of the Act.[2/]

The claim of ineffective counsel is measured by whether the representation was "woefully inadequate" or "of such a kind as to shock the conscience of the court and make the proceedings a farce and a mockery of justice." United States ex rel. Walker v. Henderson, _____F.2d_____(2nd Cir. filed January 7, 1974); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42-43 (2d Cir. 1972). In our view, the quality of representation afforded to petitioner throughout the state proceeding clearly does not give rise to a valid claim of ineffective counsel under these standards. Furthermore, to the extent that these contentions aver that the plea of guilty was involuntary, we reject such an argument. The circumstances that existed at the time of the plea, judged objectively, indicate to this court that the

plea was voluntary and represented an intelligent choice among the alternative courses of action then open to petitioner. North Carolina v. Alford, 400 U.S. 25, 31 (1970); United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972).

Petitioner's next claim, that the bail set by the court was excessive, cannot fairly be said to relate to the voluntariness of his guilty plea and is therefore waived by the entry of such a plea. United States ex rel. Rogers v. Warden of Attica State Prison, 381 F.2d 209, 212-13 (2d Cir. 1967); United States ex rel. Glenn v. McMann, 349 F.2d 1018, 1019 (2d Cir. 1965). Thus, it is not properly before us for consideration.

The final claim for our consideration is that the state court judge who accepted the guilty plea and sentenced petitioner was prejudiced and biased against him.[3] We have searched the record in vain for indicia of actual or subjective bias by the judge. Furthermore, we do not believe that the judge's previous contacts with petitioner either as a judge or as Vermont Attorney General[4] created such an inherently prejudicial atmosphere that his judicial neutrality was sacrificed. United States v. Beneke, 449 F.2d 1259 (8th Cir. 1971). Thus we conclude that this contention affords no basis for relief.[5]

Since we have found no merit in any of the claims raised by petitioner, we hereby deny the petition for a writ of habeas corpus.

Dated at Burlington in the District of Vermont, this 22nd day of February, 1974.

District Judge

FOOTNOTES

1/ The parties agree that petitioner's guilty plea was effected by means of "plea bargaining." However, petitioner asserts that the state's attorney did not fulfill one of the conditions of the agreement in that he made a recommendation as to petitioner's sentence which petitioner claims contravenes the terms of the agreement. We find it unnecessary to delve into the provisions of any such agreement because it is apparent from the transcript of the January 5, 1972 hearing that the state's attorney made no recommendation as to the sentence and thus there is no factual basis to support the contentions of prosecutorial impropriety urged upon us.

2/ Although petitioner does not attack the Habitual Offender Act, we note that the constitutionality of an habitual offender's act similar to Vermont's was recently sustained in Mottram v. Murch, 330 F. Supp. 51, 63 (D. Me. 1971), rev'd on other grounds, 458 F.2d 626 (1st Cir. 1972), rev'd on other grounds, 409 U.S. 41 (1972).

3/ This contention was amplified in a motion to amend the habeas corpus petition filed February 7, 1974. Appended thereto was a copy of the transcript of the hearing held in Washington County Court on September 13 and 14 on his petition for post-conviction relief, a copy of the opinion in New Jersey v. Kunz, 55 N.J. 128 (1969) holding that an accused is entitled to disclosure of a pre-sentence report with opportunity to be heard as to any adverse matters contained therein, a copy of the rebuttal brief filed by his counsel with the Vermont Supreme Court in connection with plaintiff's appeal from the denial of post-conviction relief by the Washington County Court, a copy of a pre-sentence report relative to one Richard Cronin ostensibly to demonstrate that pre-sentence reports are furnished to those who are the subject thereof upon occasion, and a copy of the motion filed in the Vermont District Court, Unit V, Washington County proceedings prior to sentencing on the charge of a violation of 13 V.S.A. § 2002 (false token) by which plaintiff sought to have the presiding judge disqualify himself. Plaintiff's motion to amend his petition for a writ of habeas corpus is hereby granted and the documents filed therewith have been considered by us in our opinion.

4/ In 1965 or 1966 Judge Connarn, who was then serving as Attorney General of Vermont, represented the State in a post-conviction relief proceeding involving petitioner.

5/ Petitioner has moved for permission to represent himself in this matter. While ordinarily this court would appoint counsel to assist petitioner, we believe that, in this case, appointment of counsel would be of minimal assistance to petitioner and would not materially assist the court in the resolution of the issues before us. Petitioner has also filed for our consideration a copy of the brief which his attorneys filed in the Vermont Supreme Court seeking to set aside his conviction in that forum.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

John Shuttle	:	
	:	Civil Action
v.	:	
	:	File No. 73-198
Julius Moeykens	:	

ORDER

By opinion and order filed February 22, 1974, this Court, after consideration of the contentions raised by petitioner and review of the documents submitted by both petitioner and respondent, denied petitioner's application for a writ of habeas corpus.

Thereafter, on February 27, 1974, a notice of appeal was filed by petitioner together with a request for a certificate of probable cause.

Petitioner represents that he intends to raise the following issues on appeal:

(1) Whether the State Court Judge's refusal to disqualify himself from considering petitioner's case was improper, [1] an argument which was rejected by this Court.

(2) Whether this Court "suspended" the writ of habeas corpus by taking seven months to rule on petitioner's writ without holding a hearing or affording petitioner legal counsel.

28 U.S.C. § 2253 provides in pertinent part that with respect to habeas corpus proceedings:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises

Filed March 8, 1974
Keith E. Shuttle
Deputy Clerk

> out of process issued by a state court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

The provisions of section 2253 are substantially repeated by Rule 22(b) Fed. R. App. P. with the additional proviso that:

> If an appeal is taken . . . the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue.

If, in the district judge's opinion, adequate questions for appellate review are presented, a certificate of probable cause should issue. However, appellate review of plainly frivolous issues should not receive the sanction of a district judge's probable cause certificate. See Poe v. Gladden, 287 F.2d 249, 251 (9th Cir. 1961).

In this case, the first issue raised in petitioner's request for a certificate of probable cause, whether the state court judge improperly sat in judgment of petitioner, in our opinion presents a question sufficient to justify the issuance of a probable cause certificate and, as to that issue, probable cause for the appeal is hereby found.

However, we believe that the second issue concerning this court's alleged "suspension" of the writ of habeas corpus is frivolous and does not merit the issuance of a probable cause certificate. In compliance with Rule 22(b) Fed. R. App. P. we set forth the following reasons which lead us to this conclusion.

Petitioner's writ was received by the Clerk of this Court on July 20, 1973. On the same date, the Clerk, pursuant to a procedure recently adopted in this District,

sent petitioner a detailed questionnaire to be completed and returned.[2/] Petitioner was specifically informed at that time that the questionnaire had to be returned before the court would act upon the petition. Without explanation, petitioner delayed in returning said questionnaire until October 15, 1973. The following day, after considering the petition and questionnaire, in forma pauperis filing was approved by the Court and an order to show cause why the writ should not be granted was directed to be served upon respondent. Upon application by respondent, an extension for the response to said show cause order was granted until October 26, 1973, a date which practically coincided with the undersigned's departure from this District for the purpose of sitting in the Eastern District of New York for the month of November. In the early part of December, 1973, this Court returned to the District of Vermont.

After notifying him on January 9, 1974 that the merits of his petition were presently under consideration the petitioner filed supplemental material in the form of a motion to amend the petition together with numerous appendices on January 15, 1974. After due consideration of all the material presented to the court, the writ was denied on February 22, 1974.

With regard to petitioner's representations that no hearing was held and that he was not afforded counsel, the opinion of February 22, 1974 is sufficiently explicit as to the reasons therefor to obviate the need for repetition here.

In light of this background, to contend that the writ of habeas corpus was suspended either within the meaning

of Article 1, Section 9, Clause 2 of the United States Constitution or otherwise in our view strains credulity, is plainly frivolous and thus we decline to certify that there is probable cause to raise this matter on appeal.

WHEREFORE, the Court certifies that there is probable cause to raise on appeal the first issue contained in petitioner's request for certificate of probable cause filed February 27, 1974 and there is no probable cause to raise the second issue contained in said request for the reasons stated above.

Dated at Burlington in the District of Vermont, this 8th day of March, 1974.

District Judge

FOOTNOTES

1/ We note that petitioner represents in said request for certificate of probable cause that the state court judge had "unsuccessfully" prosecuted petitioner in his capacity as Attorney General of the State of Vermont. This allegation finds no support in the transcripts and other materials submitted to us for our consideration by the petitioner. However, whether the State Court Judge was successful or "unsuccessful" has no bearing on our determination of any of the issues presented in the application for writ of habeas corpus.

2/ The primary focus of the questionnaire is to determine whether the petitioner has exhausted his state remedies, an essential precondition to the exercise of our jurisdiction. 28 U.S.C. § 2254(b).

T-357*

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

John Shuttle)
)
vs.) Civil Action
)
Julius Moeykens) No. 73-198

INDEX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

JOHN SHUTTLE, :

Petitioner-Appellant, :

-against- : Docket No. 74-1644

JULIUS MOEYKENS, : AFFIDAVIT OF MAILING

Respondent-Appellee. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WALDO B. WARNER, being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 10th day of June, 1974, I served three copies of the Brief for Appellant in this action on William T. Keefe, Assistant Attorney General of the State of Vermont, Pavilion Office Building, Montpelier, Vermont 05602, by depositing true copies thereof in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Waldo B. Warner

Sworn to before me this
10th day of June, 1974.

Notary Public

GUSTAVE FOEHRING
Notary Public, State of New York
No. 24-6344500 Qualified in Kings County
Cert. filed in New York County
Commission Expires March 30, 1976